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COURT OF APPEALS
DIVISION II

2017 JAN 20 AM 11:19

NO. 48903-1-II

STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON C
DIVISION II DEPUTY

OTTO MICHAEL GUARDADO,

Appellant,

v.

DIANA VICTORIA GUARDADO,

Respondent.

BRIEF OF RESPONDENT
DIANA VICTORIA GUARDADO

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INTRODUCTION

Judge Brian Altman's order granting Respondent's CR 60(b)(11) motion, modifying the parties' divorce decree to require Appellant to sell his house, and granting Respondent attorneys' fees, should be affirmed. There is substantial evidence in the record to support all findings of the Trial Court, the Trial Court did not abuse its discretion, and Appellants raise no valid legal arguments indicating the Trial Court erred in any decision. Respondent suffered great harm when Appellant failed to make timely payments on the mortgage to the property to which Appellant was still obligated, despite having no ownership interest in the property itself. Once Respondent became aware of the harm after being contacted by the bank about the delinquent payments and later being denied a loan, she acted diligently, first to work with Appellant outside of court to get her named removed, then through litigation when working with Appellant was fruitless. Throughout this time period, Appellant dragged his feet, made false statements to Respondent in an attempt to placate her, and ultimately took advantage of Respondent, using her to secure a lower mortgage payment and extinguish some of the debt on the property to no

benefit to her. As such, Judge Altman's rulings were proper and should be upheld.

STATEMENT OF THE CASE

Appellant and Respondent, husband and wife, purchased a home in 2007 (hereinafter the "Property"). (CP at 82.) In 2008 the parties divorced. (CP at 83.) The action was filed in Skamania County with the parties representing themselves. (Appellant's Brief at 6.)

The Appellant agreed to take the home subject to the debt with a standard hold harmless agreement. (CP at 123-130.) No provision was made in the divorce decree (hereinafter the "Divorce Decree") to remove the respondent from the mortgage (hereinafter the "Mortgage"). (*Id.*)

Over the next approximately three (3) years the Appellant did nothing to remove Respondent from the Mortgage. (RP at 47.) Since 2008 the parties had discussed removing Respondent from the Mortgage, but in 2011, after realizing the significant harm done to her credit by Appellant's failure to make timely payments on the Mortgage, Respondent began requesting that the Appellant remove her from the Mortgage. (RP at 63.) In 2011 Appellant assured the respondent that he would begin the process but continued to delay

doing so. (RP at 75.) Respondent then suggested the Appellant do a short sale. (RP at 34.) After leading Respondent on, and telling her he would do a short sale, he later refused. (*Id.*) In late 2011 the Appellant then told respondent that the Bank of America would permit him to assume the loan which would relieve Respondent of responsibility on the Mortgage. (*Id.*)

By this time, Appellant has missed a significant number of monthly payments. (RP at 13, 15, 26, 43-44, 117, and 121.) Respondent was receiving late notices and payment demands from the mortgager. (RP at 91.) Appellant's poor payment history made it impossible for Respondent to get any type of a loan. (RP at 44-47, 55, and 91.)

In 2012, Appellant approached Bank of America about a loan modification. (Appellant's Brief, at 8.) Appellant also approached Respondent for the purpose of signing a quit claim deed. (*Id.*) Appellant assured Respondent that if she signed a quit claim deed her name would be removed from the mortgage. (RP at 64-65.)

In reliance on the Appellant's representation, she executed the quit claim deed. (Appellant's Brief, at 8.) Unbeknownst to Respondent, Appellant never intended to remove her name from

the mortgage and instead merely modified the loan, receiving a principal reduction consequently lowering his monthly house payment. (RP at 14 and 65.) Respondent was still responsible on the loan and she received no benefit from the modification. (RP at 14 and 83-84.)

At this point, Respondent was forced to file suit for breach of contract and all other equitable relief the Court deemed just and proper. (CP at 1-6.) During the discovery process, Appellant submitted oppressive discovery requests on more than one occasion leading the Trial Court to enter an order sanctioning the Appellant for discovery violations and assessing attorneys' fees. (1/14/2016 RP at 4 and 21-22.)

On the first day of trial, Appellant, through his attorney, represented to the Court that he was prequalified for a refinance and a continuance to complete the refinance would be in everyone's best interests. (2/26/2016 RP at 6-8 and 10-12.) After much cajoling by the Court, Respondent agreed to the continuance. (*Id.*) At the time, the Appellant's attorney made the representation to the Court regarding his prequalification. (*Id.* at 10.) Appellant failed to disclose he had already missed one payment. (*Id.*, at 1-18; RP at 13 [testifying he failed to make payments on the Mortgage in

January and March of 2016].) Despite the delay, Appellant was unable to qualify and the parties proceeded to trial.

After the continuance was ordered, and Appellant and his attorney had left the courthouse, Respondent's attorney requested the Court to go back on the record. (Supplemental RP at 1.) Respondent's attorney had attempted to contact Appellant's attorney by phone but was unsuccessful. The purpose for recalling the case was for Respondent's attorney to request the Trial Court to vacate the order entered previously. (*Id.*) The reasoning was that a recent judgment against Appellant while he was attempting to qualify for a refinance would be detrimental to his credit. The Trial Court granted the order without discussion. (*Id.*)

During trial, Appellant put on substantial testimony about his poor financial condition because of the current case, as well as ongoing litigation in his fourth divorce. (RP at 114-118, 126-127, 129-130, and 132; See *also* 8/27/2015 RP at 7.) The Court then directed the parties to prepare "pocket briefs" regarding the equitable powers of the court to modify the Divorce Decree. (RP at 85-86.)

The Trial Court ordered the Property to be sold, as Appellant would be unable to refinance. (CP at 345-348 and 350-352.) The

Court set a supersedeas bond. (CP at 353-354.) Appellant failed to post a bond. The Property has been sold and Appellant has moved out of the Property. Respondent's award of attorneys' fees has been paid and a satisfaction of judgment has been filed.

APPLICABLE STANDARDS OF REVIEW

The Trial Court's findings of fact are reviewed under a substantial evidence standard, defined as "a quantum of evidence sufficient to persuade a fair-minded person that the premise is true." (*Rainier View Court Homeowners Association, Inc. v. Zenker* (2010) 157 Wn.App. 710, 719.)

The Trial Court's grant of a motion under CR 60(b) is reviewed for abuse of discretion. (*Marriage of Thurston* (1998) 92 Wn.App. 494, 499 [hereinafter "*Thurston*"]; *Lindgren v. Lindgren* (1990) 58 Wn.App. 588, 595 [hereinafter "*Lindgren*"]; *Carpenter v. Elway* (Wash. App. Ct. 1999) 988 P.2d 1009, 1014 [hereinafter "*Carpenter*"]; *Marriage of Knies* (1999) 96 Wn.App. 243, 248 [hereinafter "*Knies*"). Discretion is abused where it is exercised on untenable grounds or for untenable reasons, or where the discretionary act was manifestly unreasonable. (*Lindgren*, at 595; *Knies*, at 248.)

The Trial Court's award of attorneys' fees should be reviewed for abuse of discretion. (*Animal Welfare Society v. UW* (1990) 114 Wn.2d 677, 688.)

ARGUMENT

I. The Trial Court Did Not Err by Granting Respondent's Motion to Modify a Dissolution Decree Under CR 60(b)(11) Without Effectuating the Rule's Procedures

Appellant argues that the trial court erred by modifying the Divorce Decree under CR 60(b)(11), because Respondent failed to follow the procedures set out in CR 60(e). Specifically, Appellant argues Respondent failed to provide an affidavit with their CR 60(b)(11) motion, failed to give proper notice of the CR 60(b)(11) motion, failed to properly serve the CR 60(b)(11) motion, and failed to submit the motion within the cause of action of the original divorce proceeding.

A. The Trial Court Did Not Err By Granting the CR 60(b)(11) Motion Outside of the Original Cause of Action

CR 60(e) does not require that the CR 60(b)(11) motion be filed in the same cause of action as the divorce decree. CR60(e)(1) states, in relevant part, "Application shall be made by motion in the cause stating the grounds..." CR 60(e) is ambiguous as to which

cause of action is “the cause” the motion must be filed in.

Regardless, a copy of the amended decree was filed in the original cause of action. (6/2/2016 RP at 2.)

An appellant waives an assignment of error where they fail to cite any authority supporting their logic. (*Lodis v. Corbis Holdings, Inc.* (2015) 192 Wn.App. 30, 64 at fn. 17; *Skagit County Pub. Hosp. Dist. No. 1 v. Dep’t of Revenue* (2010) 158 Wn.App. 426, 440.) Appellant cites no case law in support of the notion that CR 60(e) requires that a CR 60(b)(11) motion be filed in the same cause of action as the original divorce decree. Therefore, the trial court did not err by granting the CR 60(b)(11) motion in a different cause of action than the original divorce proceeding.

B. The Trial Court Did Not Err By Granting the CR 60(b)(11) Motion Without Proper Notice

Adequate notice was given of the CR 60(b)(11) motion, contrary to Appellant’s claim. The trial court initiated the CR 60(b)(11) sua sponte at the conclusion of the first day of trial, and requested the parties to brief the issue. (RP at 85.) Respondent filed a CR 60(b)(11) on the second day of trial, memorializing the trial court’s sua sponte action. (CP at 256-257.) It is clear that Appellant had adequate notice from the record—Appellant’s

attorney briefed the CR 60 issue extensively in the pocket brief submitted to the Trial Court on the second day of trial and discussed the application of CR 60(b)(11) in her closing statement. (CP at 108-112; RP at 142-143.) Therefore, proper notice was given, and the Trial Court did not err.

C. The Trial Court Did Not Err By Granting the CR 60(b)(11) Motion When the Motion Was Not Served on the Appellant

The purpose of the rule announced in CR 60(e)(3), requiring the service of a motion to vacate or modify a judgment on the opposing party, is purely to provide notice to the opposing party. (*Lindgren*, at 593.) Where a copy of the motion to vacate or modify a judgment is received by the opposing party, and that party has recently filed papers relating to the same action, and that party appears and opposes the motion, that party had adequate notice of the motion to vacate or modify a judgment. (*Id.*; *Carpenter*, at 1014; *Roberson v. Perez* (Wash. App. Ct. 2004) 96 P.3d 420, 425-426.) In this case, as discussed above, Appellant had adequate notice of the CR 60(b)(11) motion and that the trial court was considering relief under CR 60(b) in the dissolution case—Appellant briefed the CR 60(b)(11) issue prior to the second day of trial, and Appellant's attorney discussed the CR 60(b)(11) issue in her closing statement.

(CP at 108-112; RP at 142-143.) Therefore, Appellant was given adequate notice of the motion, and the trial court did not err in granting the CR 60(b)(11) motion.

D. The Trial Court Did Not Err By Granting the CR 60(b)(11) Motion Where the Motion was Not Accompanied By an Affidavit

It is not necessary to submit a supporting affidavit pursuant to CR 60(e)(1) if the grounds for the motion are clearly evidenced from an examination of the files. (*In the Matter of Marriage of Tang* (1990) 57 Wash. App. 648, 653-654; *Griggs v. Averbek Realty, Inc.* (1979) 92 Wn.2d 576, 583-584 [hereinafter “*Griggs*”] [excusing failure of a defaulted defendant to provide an affidavit where file contained extensive memorandum of facts and law prepared in support of earlier summary judgment motion].) In this case, the trial court had already heard a full day of trial prior to the filing of the CR 60(b)(11) motion and had even asked the parties to brief the issue at the conclusion of that day of trial. (RP at 85-86.) The pleadings make clear the divorce decree is the source of the harm to Respondent, and seek equitable relief in each iteration. (CP at 1-6, 57-62, and 97-99.) Furthermore, the parties fully briefed the issue under the facts of the case at the request of the Trial Court. (CP at 103-255 and 258-303.) Therefore, the grounds for the motion were

clearly evidenced from an examination of the files, the Trial Court was privy to this information and reviewed it, and the Trial Court did not err in granting the CR 60(b)(11) motion despite the failure of Respondent to accompany the motion with a supporting affidavit.

E. Any Procedural Error in Violation of CR 60(e) Was Harmless

“A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” (*Mackay v. Acorn Custom Cabinetry* (1995) 127 Wn.2d 302, 311.) Even if the procedural rules of CR(60)(e) are violated, the rules are to be construed to secure the just determination of every action. (Griggs, at 583; See *also* CR 1.) In this case, all of the CR 60(e) violations, or alleged violations, were trivial, not prejudicial to Appellant, and in no way affected the final outcome of the case. Appellant cites no prejudice to him as a result of these violations, and nor can he. As discussed above, Appellant was on full notice of the CR 60(b)(11) motion, and that the trial court was considering CR 60(b)(11). Appellant was given a full opportunity to brief the issue, and did in fact do so. Reversing the trial court’s decision on CR 60(e) grounds would, furthermore, constitute a waste of judicial resources—Respondent would be required to file a motion in the

original dissolution action, using the same motion, drafting an affidavit containing the facts and principals of law contained in Respondent's pocket brief, and serve the motion and affidavit on Respondent, likely reaching the same outcome in the trial court, then once more come before this Court. Therefore, because Appellant was not prejudiced by any violations of CR 60(e), the violations were merely formal, and the interests of justice would be served by excusing any alleged violations of CR 60(e) in this matter, the Court should affirm the decision of the Trial Court granting the CR 60(b)(11) motion and excuse any alleged procedural violation.

II. The Trial Court did Not Err by Modifying the Dissolution Decree Under CR(60)(b)(11)

A. The Trial Court Had Authority to Modify the Decree

The trial court had ample authority to modify the Divorce Decree under CR 60(b), pursuant to Washington state case law. (*Marriage of Jennings* (1999) 138 Wn.2d 612, 629 [hereinafter "*Jennings*"] [affirming a trial court order, vacating a dissolution decree in part under CR 60(b)(11) and amending that decree to award compensatory spousal maintenance]; *Knies*, at 250 ["In the present case we find extraordinary circumstances existed, and the

trial court did not abuse its discretion in modifying the property settlement under CR 60(b)(11)].) In his brief, Appellant makes citations to authority, and quotes those authorities stating a divorce decree can be modified. (Appellant's Brief, at 24 -25 [quoting *In re Marriage of Thompson* (1999) 97 Wash.App. 873, 878, stating "A degree is modified when..." and "A trial court does not have the authority to modify even its own decree in the absence of conditions..."; also citing *In re Marriage of Bobbitt* (2006) 135 Wash.App. 8,18 (hereinafter "*Bobbitt*"), for the proposition that "The trial court cannot modify property dispositions without the existence of conditions justifying reopening the decree under laws of this state"].) This assignment of error appears disingenuous. The trial court had authority under CR 60(b)(11) to modify the divorce decree.

B. The Decree Was Modified Within a Reasonable Time

A motion made under CR 60(b) must be made within a reasonable time. (CR 60(b).) What constitutes a reasonable time depends on the facts of the case. (*Thurston*, at 500.) "The mere passage of time between the entry of judgment and the motion to set it aside is not controlling. Rather, a triggering event for the motion may arise well after entry of the judgment that the moving

party seeks to vacate. Major considerations that may be relevant in determining timeliness are whether the nonmoving party is prejudiced by the delay and whether the moving party has a good reason for failing to take action sooner.” (*Id.*)

Appellant was not prejudiced by the elapse of time between the filing of the Divorce Decree and the filing of the CR 60(b)(11) motion. At trial, the only prejudice Appellant alleged was that he would have to move. (RP at 40 and 131-132) The Trial Court properly found that this was a mere inconvenience. (CP at 347) Furthermore, Appellant testified that he had missed house payments recently, and that due to present and future financial constraints he was potentially more likely to miss mortgage payments in the future. (RP at 114-118, 126-127, 129-130, and 132; 8/27/2015 RP at 7.) It is reasonably likely, thus, Appellant would have to move anyways, due to financial considerations. Therefore, Appellant was not in any way prejudiced by the elapse of time between the filing of the divorce decree and the filing of the motion for relief under CR 60(b)(11).

Respondent motioned the trial court for relief under CR 60(b)(11) in a reasonable time. The claimed injury is damage to Respondent’s credit. (CP at 57-58 and 97-99; RP at 44-47.) The

harm for which relief was sought, thus, did not arise until Appellant had made late payments on the Mortgage, those late payments went to collections, and Respondent was contacted by the mortgagers and attempted to take out a loan. (RP at 53, 55 [“After he got modification, I asked him to refinance because I find out I can’t get a loan”], and 91; CP at 332.) Once the harm was identified, Respondent attempted, as did the respondent in *Thurston*, to redress her harm outside of court, through cooperation with Appellant, prior to motioning the trial court for equitable relief. (RP at 43, 55-58, 63-65, 75, 77-79, and 81-83; 1/28/2016 RP at 10 [“I believe that throughout our marriage and post marriage and throughout the last approximately four years of attempting to deal with her over this loan...”].) Appellant acted like he was working with Respondent towards preventing and redressing further harm, telling her he was talking to the bank about removing her name from the Mortgage, insisting she would be removed from the Mortgage once he and she completed various tasks, and inducing her to sign a quit claim deed for the Property. (RP at 15, 18, 29-32, 64-65, 77-79, and 81-83.) At one point, Appellant testified that he told Respondent he would put the Property up for a short sale. (RP at 34.) Appellant even sought

Respondent's permission to pause the proceedings, which was granted, so Appellant could once more attempt to remove Respondent's name from the mortgage. (2/26/2016 RP at 8 and 10-12.)

Approximately six years elapsed between the filing of the divorce decree and the filing of the underlying action. (CP at 1 and 123) Six years is a reasonable amount of time for Respondent to have sought relief, considering the amount of time it took for the harm addressed to come about and for Respondent to be aware of it, Respondent's attempts to prevent further harm outside of court, Appellant's apparent willingness to work with Respondent outside of court to prevent further harm, and the length of time the processes took that could potentially alleviate the harm which was outside the control of Respondent. Therefore, the trial court did not abuse its discretion in finding that the CR 60(b)(11) motion was made within a reasonable amount of time, and the trial court's decision should be affirmed.

C. The Trial Court Had Authority to Order the Sale of the Property Without Appellant's Consent

A trial court is authorized to order the sale of property as part of the dissolution decree, even absent the consent of both of the

parties. (*Murphy v. Murphy* (1954) 44 Wn.2d 737, 745; *Marriage of Sedlock* (1993) 69 Wn.App. 484, 503 [hereinafter “*Sedlock*”].)

Appellant relies on *Bobbitt* for the proposition that a “trial court does not have jurisdiction to order the sale of the parties’ assets without their consent because there is no statutory grant of such power to a trial court.” (Appellant’s Brief, at 25.) Appellant’s reliance on *Bobbitt* is misplaced—the trial court in *Bobbitt* ordered the sale of the house without authority under the divorce decree. (*Bobbitt*, at 13.)

In this case, the Trial Court modified the Divorce Decree, granting authority to require the sale of the house. (CP at 350-352.) The *Bobbitt* court even stated this was the proper means to require the sale of the property in that case. (*Bobbitt*, at 18 [“Thus, the trial court erred when it allowed [Respondent] to sell [Appellant’s] property in Yakima to enhance her ability to collect her judgments against [Appellant]. Because the time for appeal had run on the property division, her remedy was to file a Civil Rule 60 motion to vacate the decree or enforce any judgments by process of law.”])

Therefore, *Bobbitt* does not support Appellant’s contention, but rather supports Respondent’s, and the trial court did not abuse its discretion by modifying the Divorce Decree to require the sale of the Property.

III. The Trial Court did Not Err by Finding Extraordinary Circumstances Existed Under CR 60(b)(11)

“The operation of CR 60(b)(11) is ‘confined to situations involving extraordinary circumstances not covered by any other section of the rule.’” (*Marriage of Hammack* (2003) 114 Wn.App. 805, 809 [hereinafter “*Hammack*”], quoting *State v. Keller* (1982) 32 Wn.App. 135, 140.) “The ‘extraordinary circumstances’ must relate to irregularities extraneous to the action of the court.” (*Id.*, at 810, citing *In re Marriage of Tang* (1990) 57 Wn.App. 648, 655-56.) What constitutes “extraordinary circumstances” is an expanding category. (*Id.*)

A. The Trial Court Properly Found Extraordinary Circumstances Existed, Because a Material Condition of the Divorce Decree Did Not Occur

Where a material condition of the divorce decree does not occur, that nonoccurrence constitutes extraordinary circumstances warranting relief under CR 60(b)(11). (*Thurston*, at 503-504 [holding that extraordinary circumstances existed where the divorce decree at issue expressly provided for the transfer of two units of a limited partnership to wife, the units were not immediately transferred, and husband argued the divorce decree did not provide

for immediate transfer of the units].) In this case, two material conditions of the divorce decree did not occur—(1) Respondent missed numerous payments on the Mortgage, responsibility for which was assigned to him in the Divorce Decree; and (2) Respondent failed to uphold the terms of the hold harmless provision by failing to make payments or making late payments on the Mortgage, causing Respondent to suffer great harm through collection actions and credit reporting. (CP at 123-127; RP at 13, 15, 26, 43-44, 117, and 121.) Furthermore, Appellant refused to take the steps necessary to prevent violation of the hold harmless provision, by failing to make timely payments, thereby excluding him from being able to refinance the mortgage and remove Respondent's name from the Mortgage, and refusing to sell the Property. (RP at 32.) Respondent made clear through her behavior and representations before and after the decree that the conditions were material, insisting her name be removed from the Mortgage so that she would not suffer harm from creditors as a result of Appellants' late payments, and insisting that Respondent receive and be responsible for the Property during the formulation of the Divorce Decree. (RP at 40; Appellant's Brief at 6-7.) Therefore, because material conditions of the Divorce Decree did not occur,

Appellant was obstructing the occurrence of those conditions, and Respondent suffered harm as a result of the nonoccurrence, and will likely suffer further harm, the Trial Court properly found extraordinary circumstances existed and did not abuse its discretion.

B. The Trial Court Properly Found Extraordinary Circumstances Existed, Because Appellant Circumvented the Property Settlement Agreement by Failing to Make Timely Payments on the Mortgage

Where one party circumvents the terms of a property settlement agreement, extraordinary circumstances exist warranting relief under CR 60(b)(11). (*Knies*, at 250-251 [holding extraordinary circumstances existed where the divorce decree provided for a split of husband's retirement benefits, husband was injured and put on disability which replaced his retirement benefits, the divorce decree made no provision for payment to wife of disability benefits, and husband denied wife a share of disability benefits]; *Jennings*, at 625-626 [holding extraordinary circumstances existed where divorce decree granted wife a portion of husband's retirement benefits, husband's employer reduced his retirement benefits and increased his disability benefits, and wife as a result received much less under the divorce decree].) In this case,

Appellant is hiding behind the fact that no provision was made to remedy his failure to make timely mortgage payments under the Divorce Decree. (CP at 123-130; RP at 14-15 and 83-84.)

Furthermore, Appellant prepared the divorce decree, and testified that Respondent has problems understanding things due to English being her second language. (RP at 18-20; 1/14/2016 RP at 6; 1/28/2016 RP at 9-12.) Therefore, because Appellant is circumventing the property settlement agreement in the Divorce Decree that he prepared, the Trial Court properly found that extraordinary circumstances existed and did not abuse its discretion.

IV. The Trial Court did Not Err by Failing to Consider that the Doctrine of Equitable Estoppel Prevented Respondent from Bringing the Action

For the doctrine of equitable estoppel to be applicable, there must be (1) acts, statements, or admissions inconsistent with a claim subsequently asserted, (2) action or change of position on the part of the other party in reliance upon such acts, statements, or admissions, and (3) a resulting injustice to such other party, if the first party is allowed to contradict or repudiate his former acts, statements, or admissions. (*Fritch v. Fritch* (1959) 53 Wn.2d 496,

505. [hereinafter "*Fritch*"]) Appellant asserts the doctrine of equitable estoppel applies because: (1) Respondent stated she would move into the Property, (2) Respondent never moved into the Property and thus Appellant remained living on the Property, and (3) Respondent brought the action at issue.

A. Respondent Never Made an Inconsistent Statement or Acted Inconsistently With the Claim Asserted

In the cause of action, Respondent sought relief for the continuing damage done to her credit as a result of Appellant failing to make timely payments on the Mortgage by removing her from the Mortgage by any means. (CP at 97-99; 4/29/2016 RP at 89-92.) Respondent moving in to the Property would not provide such relief. Therefore, the statement is not inconsistent with the claim asserted, and the doctrine of equitable estoppel is not applicable.

B. Appellant Did Not Change His Position as a Result of the Respondent's Statement

To support a claim of equitable estoppel, a parties change of position must constitute behavior other than that which they engaged in prior to the acts or statements relied upon. (*Fritch*, at 505 [holding that improvement of the property at issue did not satisfy the change in position element of equitable estoppel where

the appellant had been improving the property prior to the statement or acts relied upon, and continued to improve the property afterwards].) In this case, Appellant was living on the Property prior to Respondent's statement and continued to reside on the Property afterwards. Under *Fritch*, this does not constitute a change in position for the purposes of equitable estoppel. Thus, the doctrine of equitable estoppel is not applicable here.

C. Appellant Did Not Suffer a Resulting Injustice From Respondent's Alleged Repudiation of Her Statement

Appellant suffered no consequence from remaining on the Property at issue after Respondent allegedly repudiated her statement that she would move into the Property. Appellant made a number of requests that Respondent would have to comply with before he let her move into the Property. (CP at 332 ["If we can transfer it to your name, and you can get a modification, you can move in"].) Respondent never assented to these requests, thus any injustice Appellant may have suffered are wholly unrelated to Respondent's alleged repudiation. Even if the loss of his Property could be considered a resulting injustice, however, Appellant's conditions to Respondent complying with his request would result in the same state—Appellant would lose ownership of the Property.

Therefore, it cannot be said that any injustice Appellant has suffered is a result of Respondent's alleged repudiation of her statement, as he was willing to place himself in the same state if Respondent had not repudiated her statement, and the doctrine of equitable estoppel is inapplicable here.

V. The Trial Court Did Not Error When it Imposed Terms and Conditions Upon a Divorce Decree that the Parties had Never Discussed or Agreed Upon

A trial court has the authority to insert terms never agreed upon by the parties, when modifying a divorce decree under CR 60(b). (*Knies*, at 250-251; *Jennings*, at 625-626.) In allocating property in a divorce decree, the trial court may fashion terms in order to accomplish an equitable result. (*Sedlock*, at 503; *See also* RCW 26.09.080.) Appellant's reliance on *Geonerco, Inc. v. Grand Ridge Properties IV, LLC* (2011) 159 Wash.App. 536 (hereinafter "*Geonerco*") is misplaced. *Geonerco* concerned the modification of a contract to develop and sell property, not a divorce decree. (*Geonerco*, at 538.) Trial courts have equitable powers in fashioning and modifying a divorce decree, that they do not have while vacating a judgment concerning a property sale agreement. Furthermore, the court in *Geonerco* noted that the trial court's grant

of affirmative relief could have been proper under the court's equitable authority to sanction bad faith conduct. (*Id.*, at 544.) In this case, the Trial Court specifically found that Appellant had engaged in bad faith conduct, and thus the terms imposed by the Trial Court could be justified on those grounds as well. (CP at 348.) Appellant cites to no other authority for the proposition that the Trial Court did not have the authority to modify the divorce decree to include terms the parties have not agreed upon. Therefore, the Trial Court did not abuse its discretion in modifying the Divorce Decree to include terms the parties had not agreed upon.

VI. The Trial Court Did Not Error By Performing In Camera Review of Attorneys' Fees and Awarding Them

A. The Trial Court Did Not Review the Billings In Camera

The Trial Court reviewed the attorneys' fees billings at the June 2, 2016 hearing. (6/2/2016 RP at 3.) Respondent submitted the attorneys' fees billings to the Trial Court in open court—it is unclear why a copy was not filed with the clerk's office. (5/26/2016 RP at 9.) Appellant's attorney appeared at that hearing. The record makes clear that Appellant's attorney received and reviewed a copy of the line by line attorneys' fees billings prior to the June 2, 2016 hearing. (5/26/2016 RP at 8-9; 6/2/2016 RP at 3 ["I read it too and I

have absolutely no complaints to the listing of his charges”].)

Therefore, the trial court did not error by performing an in camera review of the detailed attorneys’ fees billings.

B. The Appellant Waived His Right to Challenge the Attorneys’ Fees Billings, Because His Attorney Reviewed the Billings and Approved Them

“A waiver is the intentional and voluntary relinquishment of a known right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. To constitute implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive...” (224 *Westlake, LLC v. Engstrom Props., LLC* (Wash. Ct. App. 2012) 281 P.3d 693, 702.) In this case, the Appellant intentionally and voluntarily relinquished his right to contest the attorneys’ fees billings after he and his attorney, Millie Roberge, reviewed the billings and informed the trial court, on June 2, 2016, she found the billings “reasonable” and that she has “absolutely no complaints as to the listing of his charges.” (6/2/2016 RP at 3.) It is clear from these statements, that Appellant, through his agent, intended to waive his right to contest the attorneys’ fees billings in this matter. Therefore, the trial court did not error in

reviewing and awarding the attorneys' fees, and the award of attorneys' fees should be affirmed.

C. The Trial Court Was Not Required to Assess Appellant's Ability to Pay

Appellant argues that the court erred because it failed to consider Appellant's ability to pay the attorneys' fees, and "in Washington, fees awarded in family law cases are assessed for the ability of parties to pay." (Appellant's Brief, at 35.) In support of this statement, Appellant cites only *In re Marriage of Konzen* (1985) 103 Wn.2d 470 (hereinafter "*Konzen*"). The award of attorneys' fees in *Konzen* was under RCW 26.09.140. (*Konzen*.) Attorneys' fees in family law cases may be awarded on other grounds, which do not require a trial court to assess the parties ability to pay. (See *In re Marriage of T* (1993) 68 Wn.App. 329 [holding that the consideration of the parties' ability to pay only applies when attorneys' fees are granted under RCW 26.09.140].) In this case, the Trial Court awarded attorneys' fees under the equitable doctrine of bad faith, and too could have been awarded them under the terms of the hold harmless provision in the Divorce Decree. (CP at 126-127 and 347-348.) Therefore, as the Trial Court did not award attorneys' fees under RCW 26.09.140, and instead under the

equitable doctrine of bad faith, the Trial Court did not error in awarding Respondent attorneys' fees without considering the Appellant's ability to pay.

VII. The Trial Court did Not Err by Entering the Various Findings of Fact Identified by Appellant

The Trial Court's finding of fact number 2 is supported by substantial evidence. The Trial Court had the Divorce Decree before it, which made a division of the property and liabilities of the parties, including the Property and the Mortgage, and which does not contain a remedy for Appellant's failure to make timely mortgage payments. (CP at 123-131.) Furthermore, Appellant testified that he prepared the Divorce Decree and neither party was represented by an attorney. (RP at 38-39.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 2 is true.

The Trial Court's finding of fact number 3 is supported by substantial evidence. The Trial Court had the Divorce Decree before it, which made a division of the property and liabilities of the parties, including the Property and the Mortgage, and which does not contain a remedy for Appellant's failure to make timely

mortgage payments. (CP at 123-131.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 3 is true.

The Trial Court's finding of fact number 4 is supported by substantial evidence. The Trial Court had the Divorce Decree before it, which made a division of the property and liabilities of the parties, including the Property and the Mortgage, and which contains the hold harmless provision. (CP at 123-131.) There is no remedy in the divorce decree for the violation of the hold harmless provision. Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 4 is true.

The Trial Court's finding of fact number 5 is supported by substantial evidence. The Trial Court had the Divorce Decree before it, which made a division of the property and liabilities of the parties, including the Property and the Mortgage, and which contains the hold harmless provision. (CP at 123-131.) The Appellant testified at trial that he failed to make timely payments on the Mortgage a number of times. (RP at 13, 15, 26, 117, and 121.) Respondent testified that Appellant failed to make timely payments

on the Mortgage 42 times. (RP at 43-44.) Respondent also testified that Appellants failure to make payments substantially hurt her credit, and she submitted exhibits to the Trial Court showing this. (RP at 44-45, 80-81, 84, and 90.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 5 is true.

The Trial Court's finding of fact number 6 is supported by substantial evidence. Respondent testified that Appellants failure to make payments substantially hurt her credit, and she submitted exhibits to the Trial Court showing this. (RP at 44-46, 80-81, 84, and 90.) Respondent also testified to all the particular injuries contained in the Trial Court's finding. (RP at 44-47, and 55.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 6 is true.

The Trial Court's finding of fact number 8 is supported by substantial evidence. Respondent testified to all the things she cannot get a loan for, due to her poor credit resulting from Appellant's untimely mortgage payments. (RP at 44-47, and 55.) Respondent testified that she wanted to get out from under the liability of the Mortgage, so that she would not be subject to the

whims of Appellant and whether or not he will or can make timely payments. (RP at 84.) The Trial Court had the Divorce Decree before it, which made a division of the property and liabilities of the parties, including the Property and the Mortgage, and which contains the hold harmless provision. (CP at 123-131.) The Appellant testified that he prepared the divorce decree and that he was not competent as an attorney. (RP at 38-39.) Furthermore, Appellant testified about a growing number of future financial burdens, which could make it more difficult to make timely mortgage payments in the future. (RP at 114-118, 126-127, 129-130, and 132; 8/27/2015 RP at 7.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 8 is true.

The Trial Court's finding of fact number 9 is supported by substantial evidence. Appellant testified that the only prejudice he would suffer would be the forced sale of the Property. (RP at 40 and 131-132.) Appellant also testified he believed he would be able to afford a satisfactory apartment. (RP at 105 and 132.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 9 is true.

The Trial Court's finding of fact number 10 is supported by substantial evidence. Appellant testified that he induced Respondent into signing a quit claim deed. (RP at 15, 18, and 29-32.) Appellant made disingenuous comments about the benefit to Respondent from signing the quit claim deed and helping Appellant receive a modification at trial. (RP at 13-14.) Appellant's attorney reiterated those comments while examining Respondent. (RP at 68-69.) Respondent made clear those comments were disingenuous, and that she realized no actual benefit at trial. (RP at 83-84.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 10 is true.

The Trial Court's finding of fact number 11 is supported by substantial evidence. Judge Altman presided over every hearing in this matter, and was able to evaluate the sincerity and attitude of Appellant during testimony. Appellant showed a lack of sympathy, by failing to remedy Respondent's harm, and actively perpetuating it, by not removing her from the Mortgage by any means. Appellant, further, showed a lack of sympathy by implying her harm was not his fault because he offered to let her move in—an offer he later revoked. (Appellant's brief, at 6-7; RP at 75.) Respondent testified

that Appellant harassed her, and even threatened her, to get her to sign the quit claim deed, so he could reduce the debt on the Mortgage and reduce his payments, with no benefit to her. (RP at 64 and 68.) Therefore, the record contains a quantum of evidence sufficient to persuade a fair-minded person that the premise of the Trial Court's finding of fact number 11 is true.

VIII. Respondent Should be Awarded Attorneys' Fees for Defending the Trial Court's Judgment on Appeal

If Respondent is the prevailing party on appeal, Respondent should be granted reasonable attorney's fees and costs under the equitable grounds cited by the Trial Court, RAP 14.3 and RAP 18.1.

CONCLUSION

The Trial Court, after hearing extensive argument and reviewing extensive briefing and pages of documents and exhibits, determined that Respondent, Diana Victoria Guardado, suffered harm as a result of Appellant's failure to make timely payments on the Mortgage, Appellant's failure to remove Respondent's name from the Mortgage, and a poorly drafted divorce decree. Despite the fact that Appellant was aware of the harm he was causing, and with the knowledge that only he had the power to cure this harm, Appellant took advantage of Respondent, telling her he would solve

her problems and instead used her to benefit only himself.

Appellant has acted with extreme bad faith during the course of litigation, serving Respondent with inappropriate discovery requests on multiple occasions, dragging his feet at every opportunity, representing to the Court that he was in the process of curing Respondent's harm when he knew otherwise, and belligerently arguing that Respondent was actually benefitting from his actions. The Trial Court order ruling that circumstances exist under which the Divorce Decree can and should be modified to relieve Respondent of the harm Appellant caused her was just and proper, and this Court should affirm it in the entirety.

RESPECTFULLY SUBMITTED this 17th day of January,
2017.



THOMAS J. FOLEY, WSBA No. 17054
Attorney for Respondent Diana Guardado

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DIVISION II

2017 JAN 20 AM 11:19

CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY DEPUTY

I certify under penalty of perjury in accordance with the laws
of the State of Washington that I caused the foregoing BRIEF OF
RESPONDENT DIANA VICTORIA GUARDADO to be served on
Appellant pro se by email at the following address:

oguardado@gmail.com

And that I caused the foregoing BRIEF OF RESPONDENT
DIANA VICTORIA GUARDADO to be filed by email at the following
address:

coa2filings@courts.wa.gov


JON CLANCY

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY _____

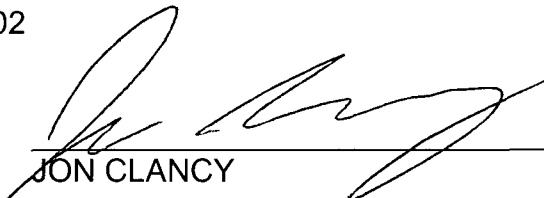
DEPUTY

I certify under penalty of perjury in accordance with the laws of the State of Washington that I caused the foregoing BRIEF OF RESPONDENT DIANA VICTORIA GUARDADO, on January 17, 2017, to be served on Appellant pro se by email at the following address:

oguardado@gmail.com

And that I caused the foregoing BRIEF OF RESPONDENT DIANA VICTORIA GUARDADO, on January 18, 2017, to be filed by U.S. Mail, First-Class postage prepaid at the following address:

Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402


JON CLANCY